AWANG BAKAR BIN AWANG DEWA & ANOR. v. DAYANG MUNAH BINTI AWANG HUSSIN

[A.C.J. (Seah J. (President), Datuk Haji Abdul Wahid Wee, Resident and Majimbun bin Majangkin, District Chief) October 26, 1974]

[Kota Kinabalu — Native Court of Appeal No. 3 of 1974]

Native Customary Law — Will — Testator a Muslim — Whether provisions of will contrary to Muslim law or native custom — Sabah Wills Ordinance (Sabah Cap. 158), s. 1(2) and (3).

Muslim Law — Will — Whether contrary to Muslim law.

The testatrix had made a will, the main beneficiary under which was the respondent. The will had been properly attested and the Native Court at Papar gave effect to the bequests under the will. This order was affirmed by the District Officer. The appellants appealed.

Held: both the Native Court and the District Officer appear to have disregarded the express provisions of sub-sections (2) and (3) of section 1 of the Wills Ordinance as they did not consider whether the bequests were in accord or in conflict with native law or custom or Muslim law. The orders must therefore be set aside and the matter ordered to be reheard by the Native Court.

NATIVE COURT OF APPEAL.

Seah J., President (delivering the judgment of the Court): On August 29, 1970 the late Dayang Jijah binti Awang Dewa made a Will in the presence of: —

1. Native Chief Ag. Hussin,
2. Ketua Kampong Ag. Limudin,
3. Tuan Iman Haji Amp. Abas and
4. Khatib Amp. Apong,

and the main beneficiary seems to be Dayang Munah binti Awang Hussin. The late Dayang Jijah binti Awang Dewa was apparently the wife of Jaludin bin Buntar (deceased).

For the purpose of this appeal, we will assume that the late Dayang Jijah binti Awang Dewa was a Muslim and subsections (2) and (3) of section 1 of the Wills Ordinance (as amended) would appear to apply. These subsections read:

"(2) Nothing in this Ordinance shall affect the validity of any Will made by any native or Muslim according to native law or custom or Islamic law as the case may be.

(3) Nothing in this Ordinance contained shall enable any native to dispose of his property by Will in a manner contrary to any law or custom having the force of law applicable to him at the time of his death."

At the Papar Native Court the following purported order was apparently made on June 29, 1971, namely: All the properties listed in the Will are to be given to Dayang Munah and a piece of land held under Native Title No. 8275 registered in the name of the deceased late husband, Jaludin bin Buntar and Limbang bin Ajak is the subject to a claim under Papar Native Court No. 220/70. It was further ordered that all other properties which have not been listed in the Will and particularly mentioned in Exhibit B are to be shared equally between Awang Bakar bin Awang Dewa and Dayang Jakiah binti Awang Ismail.

On April 15, 1972 the Papar District Officer made the following order:

"Having perused the papers herein, I am in agreement with the decision of the Native Court that all the property stated in the Will be given to Dayang Munah according to the wishes of the deceased. All other properties not mentioned in the Will to be inherited by the next of kin of the deceased through the court."

Both Awang Bakar and Dayang Jakiah are dissatisfied with the decisions of the Native Court and the District Officer and have now appealed to the Native Court of Appeal.

The Will of the late Dayang Jijah binti Awang Dewa appears to have been made in accordance with the Wills Ordinance (Cap. 158) and the fact that it had not been registered at the District Office, Papar does not affect its validity. But in ordering that all properties, both real and personal, listed in the Will should be awarded to Dayang Munah binti Awang Hussin, both the Native Court and the District Officer appear to have disregarded the express provisions of subsections (2) and (3) of section 1 of the Wills Ordinance (as amended). Both the Native Court and the District Officer do not seem to have considered the question whether the bequests of Dayang Jijah binti Awang Dewa to Dayang Munah binti Awang Hussin are in accord or in conflict with native law or custom or Muslim Law.

For this reason, we set aside the orders of the Papar Native Court and the Papar District Officer and allow this appeal.

We order a rehearing of the same matter by the same constituted Native Court at Papar as soon as practicable.

Order accordingly.